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January 18, 1994

Mr. William F. Caton
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

73-290

Re: MM Docket No. 92-290

Dear Mr. Caton:

Transmitted herewith for filing with the Commission on behalf of Bridgeways Communications Corp., licensee of Station WHAI-TV, Bridgeport, Connecticut, are an original and four copies of its "Reply Comments" in the above-referenced rulemaking proceeding.

Should there be any questions regarding this matter, please communicate with this office.

Very truly yours,

John T. Scott, III

John T. Scott, III

Enclosures

cc: Alexandra Wilson
Alan Aronowitz

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In the Matter of

Amendment of Section 76.51 of the
Commission's Rules to Include Newton,
New Jersey and Riverhead, New York,
in the New York, New York-Linden-
Patterson-Newark, New Jersey
Television Market

MM Docket No. ~~92~~-290

Even a brief examination of the interests involved in this proceeding points to the urgent need for hyphenation. This action will serve the public interest by making WHAI and the other

stations accessible to far more viewers, thereby increasing the diversity of available television voices in the New York market. It will achieve the Commission's fundamental goal of allowing competing television stations to compete fairly, on equal terms. Against these clear tangible benefits, there are no burdens. Cable operators will not face increased costs or be otherwise harmed by hyphenation.

I. HYPHENATION WILL ENABLE WHAI AND THE OTHER STATIONS TO COMPETE ON EQUAL TERMS WITH OTHER STATIONS IN THEIR ADI.

The Commission has always recognized that a primary priority of its hyphenation decisions is to equalize competition between stations serving the same markets. The Commission is well aware that in today's television markets, stations compete with others licensed to the same ADI. It was to give force to that reality that Congress determined a station's must-carry rights should generally be coextensive with its home ADI. As the Commission acknowledged in the Notice, however, the interplay of Section 76.51 and the must carry rules has created a disparity in how stations serving the same market are regulated.

Each of the commenting stations has shown that their exclusion from the New York market designation in Section 76.51 has imposed an enormous burden on them which is not imposed on other stations in the same market, producing a serious regulatory inequity. It is no secret that cable operators have used stations' liability for compulsory copyright fees to deny them carriage. Thus in the New York ADI, the interplay of the Commission's Rules

has inadvertently created a market of "haves and have-nots" where, perversely, the mostly VHF network stations, who can afford to pay royalties, are exempt from doing so, while the newer independent stations (laboring as UHF facilities as well), are potentially liable to pay literally millions of dollars in fees. The cable opponents of hyphenation fail to respond or even address this inequity. It is an inequity which makes no sense and should not be allowed to continue.

II. CABLE OPERATORS' ARGUMENTS AGAINST HYPHENATION ARE MERITLESS.

The Notice provoked very little opposition. Significantly, none of the many existing stations whose communities of license are already included in the current New York market designation opposed hyphenation. Almost none of the dozens of cable systems operating in the New York ADI opposed hyphenation. The three cable operators which do comment raise scattered objections. The Commission should recognize that they are based on incorrect assertions and promptly reject them.

A. Hyphenation Will Not Impose New Must Carry Obligations.

Cablevision Systems Corp. bases its entire opposition on an argument which is flatly wrong. It states that hyphenation would "burden Cablevision with signal carriage requirements in excess of those contemplated by the 1992 Cable Act," would "automatically accord[] these stations must carry status far beyond the local communities that they are licensed to serve," and would "expand their must carry rights." Comments at 2, 5, 7. This is

fallacious, as Cablevision should know.^{1/} Must-carry rights are determined by ADI, not by Section 76.51. Hyphenating the New York market will not extend any station's must-carry zone, nor will it require Cablevision to carry any more stations than it is required to carry under the Commission's must-carry rules.

Hyphenation will merely rectify the current, inequitable situation where one station, simply due to the geography of its ADI market, is treated as a "distant" signal for copyright royalty purposes. It will mean that a cable system will no longer have to pay copyright royalties to carry the station. Under Section 76.55(c), however, the cable system would not have been obligated to pay these fees without recompense anyway; it was free to demand indemnification from the station. Thus there is no burden placed on the cable system by redesignation of a station's market. Its carriage obligations will in no way be increased.^{2/}

1/ Cablevision Systems has the temerity to assert that the Commission "should not now allow WLIG, WMBC, or any other station to expand its must carry rights by having its community of license incorporated into a neighboring television market." (Comments at 7.) Again, Cablevision ignores the law. WLIG and WMBC are already in the same market as Cablevision's systems, and are merely trying to effectuate the must carry rights they already possess.

Similarly egregious misstatements inflict Cablevision System's entire pleading. For example, after mentioning the communities of Kingston, Riverhead, Newton and Bridgeport, it asserts, "As the Commission correctly recognizes, stations licensed to such communities do not truly compete with one another." Comments at 8. It miscites only the Notice at ¶ 16, which neither made nor implied any such finding.

2/ Time Warner complains that it should not be "compelled" to carry more stations. This rulemaking has nothing to do with the scope of Time Warner's carriage obligations. Riverside, California, DA-93-1444, released Dec. 7, 1993, at ¶ 5 (rejecting cable operator's objections to hyphenation.)

Since hyphenation will not harm or burden these cable systems, one may wonder why they have chosen to intervene. One should not wonder too long. Given that these systems have steadfastly sought to avoid their obligations to carry WHAI for months now, on the ground that WHAI must first pay enormous copyright royalty fees to them, it is hardly surprising that they should oppose a Commission action which would deny them this ground.

B. Hyphenation Should Not Be Deferred Pending
a Ruling by the U.S. Copyright Office.

While the other commenting cable operators understandably do not take Cablevision's untenable position that hyphenation will increase their must-carry obligations, they raise an equally frivolous argument. They state that there is a pending rulemaking before the U.S. Copyright Office in which that Office will determine whether to give force to the Commission's hyphenation decisions, and that any hyphenation decision should not be made until the Office completes that rulemaking. (U.S. Cablevision at 5-7, Time Warner at 8.)

This is a transparent effort to delay Commission action. There is simply no basis for awaiting the Copyright Office's action. Regardless of what action that Office takes, cable operators will not be harmed because they are fully protected by their right to demand indemnification by stations for any copyright liability.

U.S. Cablevision and Time Warner incorrectly assume that the Commission's Rules determine whether stations are "local" for

copyright purposes, and that they could be faced with the dilemma of having to pay royalties but being unable to collect the royalties from stations. In fact, the Copyright Office, applying the Copyright Act, makes this determination. If a station is treated as "distant" by that Office, copyright fees may be owed. But a cable system would not be left with the liability. Stations must, under the Commission's existing Rules, commit to indemnify cable operators for any increased copyright liability. That rule will still apply even if hyphenation occurs.^{3/}

If the Copyright Office accepts the Commission's market redesignations, there will be no copyright liability at all. In the unlikely event that the Copyright Office refuses to accept the Commission's determinations, cable operators will still have been protected by having enforced their indemnification rights. The claim that the operator will somehow be "left naked without copyright indemnification but with a substantial copyright liability" (Time Warner at 8) is thus simply wrong. It can always demand indemnification, as indeed Time Warner itself has done.^{4/}

^{3/} Time Warner constructs a straw man by claiming that the Newton station "seeks rehyphenation . . . so that it can avoid having to indemnify cable operators against copyright liability," then argues that the Commission did not intend to relieve a station from indemnification. (Comments at 7.) Hyphenation would not alter the Commission's rule requiring stations to indemnify cable operators for any increased copyright liability which is ultimately incurred.

^{4/} The Copyright Office's rulemaking has been pending for most of a year, but during that time the Commission has hyphenated no less than five separate markets. Clearly the Commission saw no reason to defer its own actions until the Copyright Office acted; the facts are no different in the present case.

C. The Test for ADI Modification Petitions
Is Not Applicable to Market Hyphenation.

Perhaps recognizing that it has no ground to oppose hyphenation proposed under the Commission's own well-established four-part test, Time Warner asserts that the Commission should use the different standard which is applied to petitions to modify an ADI. Time Warner spends most of its comments trying to show why that test is not met with regard to the Newton and Riverhead stations. This exercise is pointless, since Time Warner invokes the wrong test. The Commission recently held that the considerations which are involved in an ADI modification proceeding are distinct from those in the hyphenation process. It thus rejected a cable operator's opposition to hyphenation on grounds which were relevant to an ADI modification request. Riverside, California, DA 93-1444, released Dec. 7, 1993.

D. Prior Hyphenation Cases Warrant Hyphenation in this Case.

When the proper test is applied, hyphenation is both proper and essential for Bridgeport and the other stations which have demonstrated a commonality between their communities and the New York market as currently defined. Only U.S. Cablevision addresses this test in detail, and its arguments are incorrect.

U.S. Cablevision notes that the Riverhead station's Grade B contour does not reach New York City. The Commission has not, however, required that Grade B signals encompass the other communities in the market, where, as here, the signals of the stations licensed to that market overlap. See, e.g., Melbourne-Cocoa,

Florida, 102 FCC 2d 1062, 1071 (1985). This is because the critical fact is whether the stations are competing for audiences, which is shown by overlapping contours.

U.S. Cablevision argues that "the distances between these communities are simply too great to justify such a widely separated and diverse regional market." But the Commission has granted hyphenation for distances greater than, for example, the distance between Bridgeport and New York City (see Bridgeways Comments at 7.) Moreover, U.S. Cablevision supplies no facts to support its claim that the market is "diverse" in ways which would not warrant hyphenation. In any event, all of these stations have been placed in the same market, by Congress, for purposes of must carry rights, and they should be treated under the same rules.

Finally, U.S. Cablevision claims that the stations have failed to show a "particularized need" for redesignation, arguing that relief from inequitable copyright royalty treatment does not establish such a need. This is incorrect. The Commission has explicitly held that this is precisely the type of particularized need which satisfies this element for granting hyphenated status. Clermont, Florida, 8 FCC Rcd. at 95, Pine Bluff, Arkansas, 8 FCC Rcd. at 5595; Riverside, California, 8 FCC Rcd. at 4784; see Bridgeways Comments at 8-11.

III. A "PARTIALLY" HYPHENATED MARKET SHOULD NOT BE ADOPTED.

The Notice asks for comment on an alternative hyphenation action which would not include all of the stations in the same market, so that, for example, Riverhead and Newton would be

included with New York City but not with each other. None of the station or cable commenters support this approach. Bridgeways also does not support "splitting" the market because it would not eliminate the current regulatory inequity that is hurting it and the other UHF stations which are the subject of this proceeding.

This fundamental problem with a split market is that it would grant much more extensive "local" designations to some of the communities in the market -- those in New York City, which already enjoy copyright-free carriage throughout most of the ADI. Meanwhile, the UHF stations not licensed to New York City, which most urgently need equal treatment, would not enjoy the same status. Such a result would thus perpetuate the "two-tier" system which currently exists, and leave the UHF stations in an inferior competitive position. The best action is to hyphenate the market to recognize the business reality that all these stations are competing in the same ADI.

CONCLUSION

The Commission should follow through on its proposal, and add the communities of Bridgeport, Newton, Riverhead and Kingston to the New York major market designation in Section 76.51. This action will eradicate an arbitrary and anomalous regulatory inequity which is severely hindering the ability of the UHF stations licensed to these communities to compete and reach the public. Unless Section 76.51 is updated, these stations will continue to be denied carriage in the very market Congress where has declared they should have carriage rights. WHAI urges the

Commission to act promptly to grant the relief that will allow these stations rights comparable to the other stations in the New York market.

Respectfully submitted,

BRIDGEWAYS COMMUNICATIONS CORP.

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Dated: January 18, 1994

CERTIFICATE OF SERVICE

I hereby certify that I have this 18th day of January, 1994, caused copies of the foregoing "Reply Comments of Bridgeways Communications Corp." to be sent via first-class mail, postage prepaid, to the following:

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